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April 26, 1997

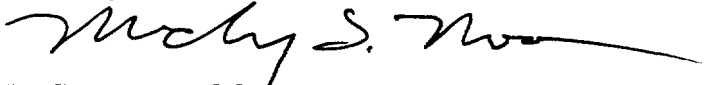
Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: CC Docket No. 97-121

Dear Madam or Sir:

Pursuant to the Commission's public notice dated April 23, 1997, please find enclosed the original and eleven copies of the Comments of the Oklahoma Attorney General Regarding the Issues raised in ALTS's Motion to Dismiss. Please date stamp the extra copy and return it in the stamped, self-addressed envelope. Thank you for your assistance.

Sincerely,



MICKEY S. MOON  
ASSISTANT ATTORNEY GENERAL

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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of )  
)  
Application of SBC Communications, Inc., )  
Southwestern Bell Telephone Company, )  
and Southwestern Bell Communications )  
Services, Inc., d/b/a Southwestern Bell )  
Long Distance for Provision of In-region )  
InterLATA Services in Oklahoma )

CC Docket No. 97-121

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FCC WASH DC

**Comments of the Oklahoma Attorney General  
Regarding the Issues raised in ALTS's Motion to Dismiss**

The Attorney General of the State of Oklahoma ("Oklahoma Attorney General"), by and through the undersigned Assistant Attorneys General, hereby files these comments in response to the Public Notice issued by the Federal Communications Commission ("FCC") in this Docket on April 23, 1997. Pursuant to that Public Notice, the Oklahoma Attorney General herein addresses the issues raised in the Motion to Dismiss ("Motion") filed by the Association for Local Telecommunications Services ("ALTS") on April 23, 1997. The Oklahoma Attorney General identifies the primary issue raised in the Motion as being whether SBC Communications, Inc. ("SBC") has satisfied the requirements of section 271(c)(1) (the "Track A" or "Track B" requirements) of the Telecommunications Act of 1996 ("Act").

The Oklahoma Attorney General recommends that before the FCC even considers whether SBC has satisfied the requirements of section 271(c)(2) of the Act (the competitive checklist requirements), under section 271(c)(1) the FCC must determine, first, whether SBC has met the requirements of the Track A road to interLATA authority

and, second, if SBC has not met the requirements of the Track A road to interLATA authority, whether SBC can jump over and proceed down the much faster Track B road to interLATA authority, and thereby bypass those requirements, or “speed bumps,” which Congress erected on the Track A road to ensure that a Bell operating company (“BOC”) does not reach its destination too soon. If the FCC determines that SBC has failed to meet the requirements of Track A and that Track B is unavailing to SBC at this time, it should dismiss SBC’s 271 application immediately without prejudice and without any further inquiry.

The Oklahoma Attorney General is the only state entity that is statutorily authorized and obligated to represent the collective interests of all Oklahoma consumers of regulated telecommunications services in any “state or federal judicial or administrative proceeding.” Okla. Stat. tit. 74, § 18b(A)(20) (West Supp. 1997). Because Track B is clearly foreclosed to SBC, and it fails to meet the requirements of Track A, the Oklahoma Attorney General, pursuant to his statutory responsibility, supports the Motion of ALTS and respectfully urges the FCC to dismiss SBC’s application filed in this Docket immediately.

**I. Track A and Track B are mutually exclusive roads to interLATA authority.**

In seeking interLATA authority, a BOC can travel down either Track A exclusively or Track B exclusively. The road taken determines the proper vehicle in which to travel towards interLATA authority: interconnection agreements on Track A or a statement of generally available terms (“SGAT”) on Track B. The vehicle used, in turn, determines the standard by which the BOC must meet the access and interconnection

requirements of § 271©(1):<sup>1</sup> actually providing access and interconnection through interconnection agreements or just generally offering access and interconnection through a SGAT. Both the language and structure of § 271, as well as the Act's legislative history, make it clear, however, that a BOC cannot reach its destination under § 271 by traveling on both roads or in both vehicles simultaneously.

## **II. SBC fails the Track A requirements.**

Based upon the facts admitted into the record during the evidentiary hearing conducted at the Oklahoma Corporation Commission ("OCC") to determine if SBC has met the requirements of § 271 of the Act,<sup>2</sup> the ALJ found that SBC has not met the Track A requirements. (Report & Recommendations of the Administrative Law Judge at 35 [hereinafter ALJ Report]). Indeed, the facts are that Track A has certain requirements that must be met and that SBC has failed to meet them all.

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<sup>1</sup> It also determines the standard by which a BOC must meet the competitive checklist requirements of § 271©(2).

<sup>2</sup> At that evidentiary hearing before the Administrative Law Judge ("ALJ") and at the hearing on appeal before the OCC *en banc*, the Oklahoma Attorney General argued that "in order to *verify* the compliance of the Bell operating company with the requirements of subsection ©," 47 U.S.C. § 271(d)(2)(B)(emphasis added), the FCC envisions that the OCC consultation be based upon a reliable evidentiary foundation. Based upon this and upon the fact that the OCC proceeding conducted to determine if SBC satisfies § 271 fits within the state law definition of an "individual proceeding," Okla. Stat. tit. 75, § 250.3(7), the OCC's procedural rules for conducting OCC adjudications, which include the examining and cross examining of witnesses and adherence to the rules of evidence, should be enforced. On appeal, the OCC ignored this requirement and based a decision upon hearsay statements and matters outside the record. While the other parties who presented evidence gave SBC the opportunity to cross examine their witnesses, SBC refused to give any party the opportunity to cross examine any of its declarants. Therefore, the FCC should recognize that the evidence proffered by SBC in this application regarding § 271© compliance is unsubstantiated and unreliable and that the evidence properly admitted into the record below thoroughly rebuts any claims of compliance.

SBC can meet the requirements of Track A only if , pursuant to OCC approved interconnection agreements, it is “providing” access and interconnection to an “unaffiliated competing provider” of local exchange service who, in turn, is providing such service “to residential and business subscribers” either exclusively or at least predominantly over its own facilities. The reason such a “competing provider” is required to be “unaffiliated,” obviously, is to prevent a BOC from getting interLATA authority when its only competitor in its local market is a bogus competitor. In other words, Congress intended there to be some meaningful competition in the BOC’s local market as a prerequisite to interLATA entry. This is clear in the legislative history of the Act,<sup>3</sup> but there is no need to look at legislative history when congressional intent is clear in the structure and plain language of the Act itself, which is the case here.

The requirement that SBC must be “providing”<sup>4</sup> access and interconnection demonstrates Congress’ intent that such unaffiliated competing provider must be operational. House Rep. No. 104-204, at 77. “Operational” means “able to function or be used.” The Random House College Dictionary 932 (1973). It is undisputed that currently the only unaffiliated competing provider of local exchange service in Oklahoma that can be even arguably called operational is Brooks Fiber Company (“Brooks”). Brooks, however,

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<sup>3</sup> House Conf. Rep. No. 104-458, at 148.

<sup>4</sup> Contrary to SBC’s assertion, the term “providing” entails more than merely making something available. If it meant no more than that, then there would be no difference between the words “providing” and “offering” used throughout § 271. Clearly Congress intended different meanings for these words. Indeed, “providing” means actually supplying something, Oxford American Dictionary 538 (1980), and further supports the proposition that Congress intended that there be some form of meaningful competition before a BOC is granted interLATA authority.

is currently operational merely as an unaffiliated competing provider of local exchange service. As indicated by Brooks own witness,<sup>5</sup> Brooks is not operational as a facilities-based competing provider of local exchange service.

Brooks "does not -- has not at any time served residential customers over its own facilities in Oklahoma." Tr. at 63. Brooks serves a grand total of four residential subscribers in the entire state of Oklahoma. Id. The local exchange service it provides to these subscribers is strictly by "[r]eselling Southwestern Bell's dial tone local exchange service." Id. Moreover, not only is this residential service being provided only on a test basis, but each of the four subscribers are employees of Brooks. Id. Indeed, since Brooks is not marketing residential services in Oklahoma, id., Brooks is not even offering facilities based local exchange service to residential subscribers at this time.<sup>6</sup>

Even the local exchange service that Brooks provides to its business subscribers cannot be described as predominantly facilities based service when twelve of its twenty business customers in Oklahoma are served over tariff leased facilities owned by SBC or resold ISDN service. Initial Comments of Brooks Fiber Communications of Oklahoma at 2, Cause No. PUD 970000064 (Okla. Corp. Comm'n, March 11, 1997). Leasing SBC's

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<sup>5</sup> See testimony of Edward J. Cadieux, Tr. of Apr. 14, 1997, Cause No. PUD 970000064 (Okla. Corp. Comm'n), at 62-68 [hereinafter Transcript or Tr.].

<sup>6</sup> SBC's reliance on Brooks' General Exchange Service tariff (see *infra* Attachment "A") filed with the OCC as indicating that Brooks is offering residential service is misleading. It does not constitute an offer for facilities based local exchange service which, if accepted by a subscriber, would give the subscriber a right to facilities based local exchange service by Brooks. Brooks expressly reserves the right to limit the use of facilities offered by it when necessary because of lack of facilities. Moreover, the tariff states that the furnishing of service under this tariff is subject to the availability of necessary facilities "at the sole discretion of the Company."

dedicated T-1 facilities through SBC's tariff filed at the OCC for leasing such facilities does not, under the Act, constitute facilities owned by the competitor, regardless of whether unbundled elements are deemed to be such facilities. The leasing of these T-1 facilities was not done pursuant to any interconnection agreement or negotiation. It is a tariff offering, not an unbundled element.

Brooks is neither offering nor providing facilities based local exchange service to residential subscribers in Oklahoma. Brooks is providing facilities based local exchange service to only eight out of twenty of its business subscribers in Oklahoma. Track A requires the presence of a competing provider of local exchange service who is operational and providing such service to residential and business subscribers at least predominantly over its own facilities. Brooks clearly does not qualify as such a competing provider, and the requirement of an operational facilities based competitor for both business and residential customers is the tangible affirmation that the local exchange is indeed open to competition. Therefore, the requirements of Track A have not been met.

**II. The Track B road is foreclosed to SBC at this time because none of the entrance ramps onto Track B from Track A are open**

Contrary to SBC's assertions, Track B is not an automatic default route to interLATA authority when it finds that the Track A requirements have not been met. It is not available when the Track A requirements have not been met for whatever reason. Section 271 identifies the only situations when Track B becomes available. None of those situations have arisen in Oklahoma. Therefore, unless and until Track B becomes

available, if SBC is to be granted interLATA authority, it must satisfy the requirements of Track A.

Track B is available only when one of three things occur: (1) "no such provider" has requested interconnection and access between specified periods of time; (2) such a provider has requested interconnection and access, but the OCC has certified that it has failed to negotiate in good faith; or (3) the OCC has certified that such a provider, having entered into an agreement with SBC, has failed to timely comply with the implementation schedule contained in such an agreement. There is no evidence, nor OCC certification, of such a provider's failure to negotiate in good faith or to comply with any implementation schedules. SBC's illogical misinterpretation of the Act, however, focuses on the "no such provider" language in Track B, alleging that if Brooks is not a Track A qualifying unaffiliated competing provider of facilities based local exchange services, then no such provider has requested interconnection and access.

Clearly, the "no such provider" language refers only to the Track A requirement that any competing provider of local exchange service must be unaffiliated with SBC. Reading that language as SBC argues would lead to absurd results. It would totally emasculate Track A's requirements by making Track B available immediately as of December 8, 1997. The only way Track A is applicable under SBC's erroneous interpretation would be if such a competing provider was operational before it even requests interconnection and access. That would be impossible unless the competing provider owned a completely duplicitous, ubiquitous network.



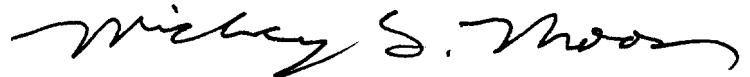
Besides Brooks, many other unaffiliated competing providers of facilities based local exchange services have requested access and interconnection to SBC's network and unbundled elements in Oklahoma. Therefore, Track B is foreclosed. If there has been a failure to negotiate an agreement by a competing provider, SBC should bring that to the attention of the OCC. Likewise, whenever SBC believes that a competing provider has failed to comply with an implementation schedule, it has the right to bring this to the attention of the OCC. The OCC can then certify whether there has been such a failure, allowing the availability of Track B. It is clear, however, that these latter two entrance ramps are the only ones which can ever allow SBC onto the Track B road, since numerous unaffiliated competing providers of local exchange services have timely requested access and interconnection from SBC.

## CONCLUSION

The Oklahoma Attorney General supports the ALTS motion to dismiss SBC's interLATA application immediately. The record established by the OCC is completely void of facts to support this application's assertions of meeting the requirements of section 271©(1). Moreover, SBC's attempt to misinterpret the requirements of section 271©(1) in order to make up for its lack of factual support is totally meritless. SBC has not met the requirements of Track A, and Track B is unavailing at this time. Therefore, the Oklahoma Attorney General, on behalf of Oklahoma's telecommunications services consumers whose interests would be adversely affected by premature entry by SBC into the interLATA market, respectfully requests the FCC to dismiss SBC's application on the basis that it fails to satisfy the threshold test of meeting the Track A/B requirements.

Respectfully submitted,

W.A. DREW EDMONDSON  
ATTORNEY GENERAL OF OKLAHOMA

A handwritten signature in black ink, appearing to read "Mickey S. Moon", written in a cursive style.

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**GENERAL EXCHANGE SERVICE****2. Regulations****2.1 Undertaking of the Company:****2.1.1 Scope**

The Company undertakes to furnish communications service in connection with one-way and/or two-way information transmission between points within the Company's certificated area in the state of OKLAHOMA under the terms of this tariff.

Customers may use services and facilities provided under this tariff to obtain access to services offered by other service providers. The Company is responsible under this tariff only for the services and facilities provided herein, and it assumes no responsibility for any service provided by any other entity that purchases access to the Company network in order to originate or terminate its own services, or to communicate with its own customers.

**2.1.2 Shortage of Equipment Facilities**

2.1.2.1 The Company reserves the right to limit or allocate the use  
—of existing facilities, or of additional facilities offered by the Company  
—when necessary because of lack of facilities or due to some other cause  
beyond the Company's control.

2.1.2.2 The furnishing of service under this tariff is subject to the availability on a continuing basis of all the necessary facilities and is limited to the  
—capacity of the Company's fiber optic cable facilities as well as  
—facilities the Company may obtain from other carriers, from time to time, to furnish service as required at the sole discretion of the Company.

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Issued: August 8, 1996

Effective October 8, 1996

By: D. Craig Young, President  
425 Woods Mill Road South Ste. 300  
Town & Country, MO 63017

Attachment "n"